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MONTANA PROSECUTOR

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STATE DOCUMENTS

UPCOMING SEMINARS AND CONVENTIONS:

Dean John Jay Douglas of the National College of District Attorneys has announced the college is now in the process of preparing the curriculum and materials for the NCDA regional programs on Non-Support. Initially, the dean wants to locate the need for such programs so that he may determine the sites for the regional conferences. The program design includes regional general sessions with state workshops. If you would like to see either a state workshop or a general session planned for this area, please contact this office as soon as possible so that the information may be passed on to the NCDA.

NDAA-NCDA
Child Abuse Seminars:

Riverside, California
January 23-28, 1977

Amhurst, Massachusetts
April 24-29, 1977

NAPC-NDAA
Midwinter Meeting
San Diego, California
March 14-17, 1977

NDAA-NCJCJ
Juvenile Justice

Los Angeles, California
February 6-10, 1977

Orlando, Florida
March 20-24, 1977

NCDA
Advanced Organized Crime Workshop
Memphis, Tennessee
January 9-14, 1977

NCDA
Prosecutor's Investigators School
January 30 - February 4, 1977
Quantico, Virginia

NCDA
Trial Techniques Seminar
Salt Lake City, Utah
February 13-17, 1977

NCDA
Newly Elected Prosecutor's Institute
Houston, Texas
February 20-24, 1977

NCDA
Organized Crime Seminar
Detroit, Michigan
March 6-10, 1977

NCDA
Consumer Fraud Seminar
San Antonio, Texas
March 20-23, 1977

NCDA
Prosecution of Crimes Against the Person
Denver, Colorado
April 3-6, 1977

NCDA
Pretrial Problems
Phoenix, Arizona
April 17-20, 1977

NDAA
Fourth National Institute on Narcotics and Dangerous Drugs
Chicago, Illinois

Enclosed you will find registration cards for the NDAA's "Mid-Winter" meeting.

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BITS AND PIECES:

Under the reign of the Tudors and the Stuarts of England, the number of capital offenses increased year by year, and one estimate puts the number of offenses punishable by death at 223 in 1819. The high number of capital offenses led the English Criminal Code of this period to be known as the "Bloody Code." Death was the penalty for everything from writing on a public bridge to high treason (low treason was the homicide by a wife of her husband). The manner of execution was varied, and it was always a public affair.

In 1812, this death sentence was pronounced in England upon seven men convicted of high treason:

> That you and each of you, be taken from whence you came and from thence be drawn on a hurdle to the place of execution where you shall be hanged by the neck, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces--that your heads be then cut off, and your bodies cut into four quarters to be at the King's disposal. And God have mercy on your souls. (From Capital Punishment, edited by James A. McCafferty, published in 1972.)

* * * *

In 1962, New York City detained 58,458 persons. Each person was held, prior to arraignment, for an average of 30 days at a cost of $6 per day per person. The cost for that one year for pre-arraignment detention was $10,822,440. An overall estimate for the nation is that pre-trial detention costs exceed $100,000,000 per year. (From Criminal Procedure Sourcebook, Volume I, by PLI, published in 1976, edited by B.J. George, Jr.)

* * * *

The following is an excerpt from an address delivered by Deputy Attorney General Harold R. Tyler, Jr., before the American Society of Criminology in Toronto, Ontario, Canada, and was reprinted in the NDAA publication, Economic Crime Digest, Volume III, No. 4. Mr. Tyler related the following information on "white collar crime:"

> ...Public losses from these crimes far exceed the combined losses sustained from more publicized crime such as robbery, burglary and extortion. During the first six months of this year, banks lost nearly five times as much from white-collar crimes as from armed robberies. Although precise total loss figures are impossible to gather, the United States Chamber of Commerce estimates that in 1974 the public loss from white-collar crimes was a staggering $40 billion. This estimate did not even include any losses sustained as a result of antitrust violations...

Mr. Tyler then goes on to disclose that federal and state officials are in the process of conducting an investigation of a fraudulent scheme in which it is estimated that the public lost "...as much as $1 billion..."

* * * *

GUEST CORNER:

From: Robert L. Deschamps, III

Subject: Special Requirements for Public Contracts

The following are some requirements for state, county, municipal, school and other governmental agency controls for "public works." Failure to comply with these provisions would make the contract in question invalid, and might in some instances leave the contracting agency, board, etc., liable for an action by interested parties (another bidder not awarded the contract, for example).

1. License Requirements. Any public works contract for a total of more than one thousand dollars ($1,000.00) can only be awarded to a licensed public contractor. Such licenses are issued by the State Department of Revenue and must be renewed yearly. There are three classes of licenses, two of which limit the contractor to accepting contracts which are not more than given amounts.

Class A licenses are unlimited, and the contractor can accept any contract.

Class B licenses limit the contractor to accepting only contracts not in excess of fifty thousand dollars ($50,000.00).

Class C licenses limit the contractor to accepting only contracts not in excess of twenty-five thousand dollars ($25,000.00). (Section 84-3505, R.C.M. 1947)

2. Not in Default on Other Public Contracts. All bid proposals must contain a statement by the contractor that he is not presently working beyond the contract time, including authorized time extensions, on any previously awarded public contract project. No contract may be awarded to a contractor who is either working overtime on a present public contract or who has not completely executed any previous contract upon which he has worked beyond contract time. (Section 84-3507 R.C.M. 1947)

3. Bid Bond. A bid for a public works contract requires security for its acceptance in the form of cash, a cashier's or certified check, money order, or bid bond from a surety corporation. Procedures for dealing with a contractor who refuses to enter into a contract after his bid was accepted are also set out in Section 6-501, R.C.M. 1947.

4. Preference to Resident Bidders. In contracts for materials, supplies, equipment, construction, repair and all public works whatever, the board, commission, officer or individual responsible for awarding the contract must give preference to Montana residents. The bid must be awarded to the lowest responsible resident bidder unless his bid is more than three percent (3%) higher than the lowest bid from a responsible non-resident bidder.

5. Determination of Resident. "Resident" as defined in 3 above is determined by the State Department of Revenue. A resident contractor's license will be stamped "resident" when the requirements for residency have been met. (Section 82-1925.1 R.C.M. 1947)

6. Preference Montana Products. In contracts for the purchase of products, materials, supplies, or equipment, the board, commission, officer, or individual shall award the contract to the bidder whose offered materials, supplies or equipment are manufactured or produced in this state by Montana industry and labor and whose bid is not more than three percent (3%) higher than the lowest bidder whose materials are not so manufactured, provided the materials are of comparable quality. (Section 82-1924, R.C.M. 1947)

7. Workers Compensation Coverage. A public works contractor must elect to be bound by Workmen's Compensation plan number 3. (Section 92-206, R.C.M. 1947)

8. Performance and Payment Bond. A public works contractor is required to give to the contracting body a sufficient bond with two or

more sureties, or a surety company, for the faithful performance of the contract and payment of all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such corporation, person or persons, or subcontractors and provisions, provender, material or supplies. (Section 6-401, R.C.M. 1947)

Failure to secure such bond makes the county liable to the above mentioned persons for the full amount of all such debts contracted for by any subcontractor as well as the contractor. (Section 6-403, R.C.M. 1947)

The bond shall be for the full amount of the contract price. (Section 6-404, R.C.M. 1947)

9. Veterans Preference. All public works contracts shall prefer for employment: veterans, their spouses and surviving spouses and the other dependents of disabled veterans; disabled civilians recommended by the state rehabilitation bureau; provided that age or disability which does not in fact incapacitate shall not disqualify such preferred person provided the person has the qualifications to discharge the duties; and further provided that disabled veterans shall be given preference over other veterans if they are capable of performing such duties.

10. Required Contract Clauses. In addition to the above requirements, the following provisions must be incorporated into all public contracts entered into by county departments, districts, and special boards.

(a) Contracts must contain the requirement that in all instances products, materials, supplies and equipment manufactured or produced in this state by Montana industry and labor shall be preferred for use in all projects, if such products, materials, supplies and equipment are comparable in price and quality. (Section 82-1926, R.C.M. 1947)

(b) In construction, repair, and maintenance contracts, and also for heavy highway and municipal construction, repair or maintenance contracts, there shall be a provision that requires the contractor to give preference to the employment of bona fide Montana residents in the performance of said work and to pay the standard prevailing rate of wages in effect in the locality in which the contract is being performed. Exact wage specifications are set out in the statutes setting forth the requirement for the above clauses. (Section 41-701, 702, R.C.M. 1947)

(c) The above provisions for inclusion of certain clauses do not apply where federal aid funds are granted with provisions prohibiting preference or discrimination. Examples of such funding are projects utilizing federal highway funds, Department of Agriculture funds, or any funding with provisions prohibiting discrimination against veterans. (Section 41-701, R.C.M. 1947)

(d) Every contract for public works shall contain a provision that all hiring on the project shall be on the basis of merit and qualifications genuinely related to competent performance of the particular occupational task for which the person is hired, and also a provision that there will be no discrimination in the employment of persons on the project on the basis of race, color, religious creed, political ideas, sex, age, marital status,

physical or mental handicap, national origin, or ancestry unless the resonable demands of employment are such that they cannot be met by a person with a particular physical or mental handicap. (Section 64-319, R.C.M. 1947)

(e) The contract must provide for the withholding of one percent (1%) of all payments made to the contractor with the amounts so withheld to be forwarded to the State Department of Revenue as the contractor's gross receipts tax. (Section 84-3513, R.C.M. 1947)

(f) In all contracts for county and school construction, repair and maintenance work under the laws of Montana, when funding is in whole or in part supplied by the United States Government, it shall be lawful to insert in the contract all provisions required by the federal statutes or regulations under which the funds are provided. (Section 82-1147, R.C.M. 1947)

(11) County Attorney Approval. Finally, all public contracts must be approved in writing by the County Attorney before they become effective. (Section 41-701, R.C.M. 1947)

* * * *

CASE DIGEST:

In Montana:

State ex rel Murphy v. District Court 33 St Rptr 1086, ____P2d____(Mont., 1976)(AG 147)

Crimes and Offenses:
Deliberate Homicide:
Criminal Accountability:

The court stated that in order to support a charge of deliberate homicide against an accomplice a showing of probable cause must exist, and in the present case the probable cause determination was made on the basis of an amended affidavit which was filed in support of a motion to file direct. The court stated that..."The definitions of deliberate homicide and criminal accountability contemplate a more active role before a person can be charged as a principal or accessory to murder." at 1090. The court, in reviewing the facts of the case, reaffirmed the principle that more than mere presence at the scene of a crime is needed to establish criminal responsibility.

* * * *

Gallagher v. Crist 33 St Rptr 1100, ____P2d____(Mont, 1976)

Constitutional Challenge:
V Amendment, U.S. Constitution:
Right Against Self-Incrimination:

The court held that the taking of a photograph of defendant's back while he was in jail and the later introduction of this photo into evidence did not deny him his constitutional guarantees.

Accused:
Rights:
To Counsel:
Conflict of Interest:

The defendant was represented by a court appointed counsel who had served in the past as the Yellowstone County Attorney and in that capacity had previously prosecuted the defendant. The court, however, found by reviewing the trial record that the defendant had been adequately represented without prejudice.

* * * *

State v. Beaudette 33 St Rptr 1117, ____P2d 13039(Mont,1976)(AG 166)

Accused:
Identification of:
Impermissibly Suggestive:

Here the three suspects' photographs were shown to witnesses prior to trial and they were asked to make an identification. This was followed by an in-court identification. While the court admitted that this was "...somewhat suggestive..." (at 1119) there was sufficient other identifying evidence to support the jury's verdict and the conviction was thus ordered to stand.

* * * *

State v. Brough 33 St Rptr 1128, ____P2d____(Mont,1976)(AG 159)

Arrest, Search and Seizure:
Search and Seizure:
Warrantless:
Consent:

In a classic case of coercive police tactics which the "exclusionary rule" was designed to deter, the consent to search in this case was found to be involuntary. After setting forth the various facts which supported the findings of coercion, the court reiterated the rule relating to burden of proof stating "...The prosecution has the burden of proving by clear positive evidence that the individual freely and intelligently gave his unequivocal and specific consent to search, uncontaminated by any duress or coercion, actual or implied." at 1130, citing State v. Laflamme 33 St Rptr 632, 634, 551 P2d 1011 (Mont,1976)

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In Other Jurisdictions:

Constitutional Challenges
Defenses and Due Process:

Petitioners were arrested and given their Miranda warnings and chose to remain silent. At trial they gave a "frame-up" story by way of a defense. They were cross-examined by the prosecutor concerning their reasons for not giving the arresting officer the same exculpatory story. The court (per Powell) ruled that implicit in the Miranda warnings is an assurance that the exercise of the right to remain silent will not carry a penalty and that such a cross-examination (conducted over the objection of the petitioners) was a due process violation. Doyle v. Ohio 96 S.Ct. 2240 (1976).

* * * *

Accused
Guilty Pleas

Respondent was charged with first degree murder but worked out a plea bargain with the prosecution and pled to second degree murder. He eventually filed a habeas corpus petition alleging that the plea was involuntary because he was not advised that an intent to cause death was an element of second degree murder. It was found that neither his attorney nor the court had advised him that intent to cause death was an element and that the plea was thus involuntary. The U.S. Supreme Court affirmed. Henderson v. Morgan 96 S.Ct. 2253 (1976).

* * * *

Constitutional Challenges
Right to a Fair Trial

Respondent was convicted of second degree murder in the stabbing death of a companion. The evidence showed that just prior to the death the victim had been carrying two knives, one of which was the murder weapon. Defense counsel learned that the victim had been previously convicted of assault and carrying a deadly weapon and on that basis, he moved for a new trial claiming that it supported the defense of self-defense and that the prosecution had failed to disclose this information.

The Supreme Court denied the motion stating that the information had not been requested and guilt had been established beyond a reasonable doubt even if this information had been considered, and thus there was no denial of defendant's right to a fair trial.

Of importance to prosecutors are the several principles delineated by the court in reference to the duty to disclose: (a) failure to disclose does not amount to a constitutional violation unless the omission is sufficiently significant to result in the denial of the defendant's right

to a fair trial; (b) the court makes it clear that the mere possibility that an item of undisclosed information might have aided the defendant or might have affected the outcome of the trial does not make the item "material" in the constitutional sense; (c) when there is a constitutional error as the result of suppression of evidence, it is the CHARACTER OF THE EVIDENCE THAT CONTROLS, NOT THE INTENT OR CHARACTER OF THE PROSECUTOR in suppressing the evidence; (d) the proper standard of materiality to be utilized in cases of undisclosed evidence is whether or not the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. If the answer to that question is "yes," constitutional error has been committed. United States v. Agurs 96 S.Ct. 2392 (1976).